MOTION FILED

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No. 09-728

In The
Supreme Court of the United States

JON A. JENSEN, JANE DOE JENSEN
and the Marital Community thereof,

Petitioners,

v.

PAUL A. STOOT, SR. and TAMMIE L. STOOT,
husband and wife, and as parents and guardians of
Paul A. Stoot II; and Paul A. Stoot II, a minor child,

Respondents.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Ninth Circuit

MOTION FOR LEAVE TO FILE AN AMICUS BRIEF AND BRIEF OF THE CITY OF ESCONDIDO *AS AMICUS CURIAE* IN SUPPORT OF PETITIONERS

JEFFREY R. EPP, City Attorney
MICHAEL R. MCGUINNESS,*
Asst. City Attorney
OFFICE OF THE CITY ATTORNEY
201 N. Broadway
Escondido, California 92025
(760) 839-4608 Tel.

RICHARD J. SCHNEIDER
GOLNAR J. FOZI
DALEY & HEFT LLP
462 Stevens Avenue, Suite 201
Solana Beach, California 92075
(858) 755-5666 Tel.
Counsel for Amicus Curiae

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION OF THE CITY OF ESCONDIDO FOR LEAVE TO FILE AN AMICUS BRIEF IN SUPPORT OF PETITIONERS

Amicus Curiae City of Escondido is a municipal corporation and general law city in the State of California. Under Rule 37.4, leave of court to file an amicus brief is not required for a city. However, under Rule 37.2, amicus curiae must provide notification of its intent to file an amicus brief to the counsel of record for all parties at least 10 days prior to the due date for the amicus curiae brief. While counsel for Petitioners was notified of the city's intent to file an amicus brief more than 10 days prior to the filing of this brief, notification to counsel for Respondents was issued only on January 20, 2010.

City of Escondido is a defendant in an action pending before the Ninth Circuit (*Crowe et al. v. City of Escondido et al.*, Docket No. 05-55467 (January 14, 2010)) which involve Fifth Amendment issues similar to those raised in the Petitioners' brief. The decision of the Ninth Circuit in *Crowe* was handed down on January 14, 2009, and relies on the *Stoot* decision. The City's interest in filing an amicus brief took urgency eight days before the deadline for filing the present amicus brief. Notification of intent to file this brief was issued to Respondents within this ten day period.

City of Escondido respectfully requests that the Court grant this motion to file an amicus brief in

support of the Petition for Writ of Certiorari despite the untimeliness of the notice to all parties.

Respectfully submitted,

JEFFREY R. EPP, City Attorney
MICHAEL R. MCGUINNESS,*
Asst. City Attorney
OFFICE OF THE CITY ATTORNEY
201 N. Broadway
Escondido, California 92025
(760) 839-4608 Tel.

RICHARD J. SCHNEIDER
GOLNAR J. FOZI
DALEY & HEFT LLP
462 Stevens Avenue, Suite 201
Solana Beach, California 92075
(858) 755-5666 Tel.
Counsel for Amicus Curiae

**Counsel of Record*

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INTEREST OF THE AMICUS CURIAE

The City of Escondido ("City") is a municipal corporation and general law city in the State of California which employs a police department. The City's police officers are involved in all forms of law enforcement activities including custodial interrogations at the earliest stages of a criminal investigation. These interrogations occur long before the decision to file charges or prosecute a case is made by the prosecuting authorities, and well before a judge decides whether a suspect's statement is even admissible at trial. The Ninth Circuit Court of Appeals' opinion in the case before the Court is controlling authority governing the liability of Escondido's police officers. The City contends that the decision is erroneous and inconsistent with the Court's decision in *Chavez v. Martinez*, 538 U.S. 760 (2003). The imposition of civil liability on police officers for alleged Fifth Amendment violations arising out of custodial interrogations is improper where a statement is never even used against the suspect at trial. The specter of personal liability also has a chilling effect on criminal investigations by law enforcement officers.

Equally important to its general interest in issues of civil liability affecting its police officers is the City's interest in a particular civil lawsuit involving similar Fifth Amendment claims. In *Michael Crowe, et al. v. County of San Diego, et al.*, the City and

several of its police officers were sued for, among other things, violation of the plaintiffs' Fifth Amendment rights incident to custodial interrogations where the resulting confessions were never used against the plaintiffs in a criminal trial. The District Court's order granting summary judgment on the Fifth Amendment claim to the Escondido police officers on the basis of *Chavez* was recently reversed by the Ninth Circuit, relying principally on its decision in *Stoot*, the case currently before the Court. *Michael Crowe, et al. v. County of San Diego, et al.*, Docket No. 05-55467 (January 14, 2010). Thus, the City has a direct and vital interest in having this Court grant the Petition for a Writ of Certiorari and issue a decision settling the split in the Circuits in accordance with its decision in *Chavez* and with the better-reasoned approach of other Circuits.

SUMMARY OF ARGUMENT

In the case before the Court, the Ninth Circuit Court of Appeal held that even though Paul Stoot was never tried for a crime, his alleged coercive custodial interrogation could support a civil lawsuit for Fifth Amendment violations under 42 U.S.C. Section 1983. *Stoot v. City of Everett*, 582 F.3d 910, 925 (9th Cir. 2009). According to the Ninth Circuit, the use of Stoot's coerced interview statement in an affidavit filed in support of papers charging him with child molestation, in the arraignment, in the bail hearing, and in

the suppression hearing, was sufficient to give rise to a Section 1983 claim, even though the statement was never used against him in a criminal trial.

The present case comes after the Supreme Court's ruling in *Chavez v. Martinez*, which held that a coercive custodial interrogation does not violate the Fifth Amendment unless the coerced statements are used in a "criminal case." In the absence of further elucidation by this Court as to the precise meaning of the term "criminal case," various Circuits have defined the term in contradictory ways. Petitioners have fully briefed this Court regarding the split among the Circuits on the definition of "criminal case." The well-reasoned opinions of the Third, Fourth and Eighth Circuits and of the Supreme Court in *Chavez* all point to the conclusion that the Fifth Amendment right against self-incrimination is a fundamental *trial* right that is violated only if a coerced statement is used against a suspect *at trial*. The Ninth Circuit, however, has given the term "criminal case" the broadest possible meaning, going so far as to hold that even using the coerced statement to charge the suspect with a crime can support a Section 1983 claim for Fifth Amendment violations.

It is vitally important that this Court resolve the split among the Circuits and define exactly where along the spectrum of legal proceedings a Fifth Amendment violation can occur and ripen into a civil claim. The Ninth Circuit's interpretation of this issue

is overly broad and goes against Supreme Court pronouncements upon which *Chavez* was decided. The split among the Circuits also gives rise to the prospect that law enforcement personnel in certain jurisdictions will have greater exposure to civil liability than their counterparts in other jurisdictions under similar factual scenarios. More importantly, the Ninth Circuit's decision imposes a chilling effect on law enforcement's ability to discharge its duties with appropriate zeal by imposing personal liability on law enforcement officers not for conscience-shocking behavior, but for more subtle legal calls made by prosecutors and judges regarding the reliability of a confession or the ultimate admissibility of it.

ARGUMENT

1. THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION IS A TRIAL RIGHT AND A MORE EXPANSIVE CONSTRUCTION IS CONTRARY TO SUPREME COURT AUTHORITY

The Fifth Amendment to the United States Constitution provides that no person shall be compelled "in any criminal case" to be a witness against himself. While this Court in *Chavez* declined to define exactly when a criminal case starts, it held that *at the very least* there should be legal proceedings, cause, suit or controversy. This Court harkened to the definition of "case" and "cause" in Black's Law Dictionary, which defined them as "action, cause, suit or controversy at

law . . . a question *contested before a court of justice.*" *Id.* at 2001 (emphasis theirs).

In discussing exactly where along the spectrum of legal proceedings a Fifth Amendment violation can occur, this Court in *Chavez* relied on three key cases: *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), *Withrow v. Williams*, 507 U.S. 680 (1993), and *Kastigar v. United States*, 406 U.S. 441, 453 (1972), all of which stand for the proposition that the Fifth Amendment is a trial right that can be violated only *at trial*. *Verdugo-Urquidez* states that "while pre-trial police conduct may ultimately impair a suspect's Fifth Amendment rights, a violation of that right can only occur if his statements are introduced against him at *trial*." 494 U.S. at 264. *Withrow* holds that the Fifth Amendment is a fundamental *trial* right. *Kastigar* holds that the "sole concern" of the Fifth Amendment is to afford protection against being forced "to give testimony leading to the infliction of penalties affixed . . . to criminal acts." 406 U.S. at 453. The *Chavez* opinion also cites Justice Marshall's dissent in *New York v. Quarles*, 467 U.S. 649, 868 (1984) that "All the Fifth Amendment forbids is the introduction of coerced statements at trial."

Even prior to *Chavez* and the cases it relied on, this Court described the Fifth Amendment as a right against self-incrimination *at trial*. *See, e.g., Bran v. United States*, 168 U.S. 352 (1897) (Fifth Amendment bars the introduction at trial of involuntary confessions made during custodial interrogations); *Johnson v. New Jersey*, 384 U.S. 719, 730 (1966) (*Miranda*

guards against the use of unreliable statements at trial); *Schneckloth v. Bustamonte*, 412 U.S. 218, 240 (1973) (basis of suppression decision is to protect the fairness of the trial itself).

This Court in *Chavez* ostensibly left open the ultimate question of when a criminal case begins, but its opinions have provided sufficient guidance regarding the scope and purpose of the Fifth Amendment as a trial right. It is the *use* of coerced statements at trial that constitutes a Fifth Amendment violation, not the coercion itself. Despite this clear guidance from the Supreme Court, the Ninth Circuit, as well as the Second and Seventh Circuits, have expanded the scope of the Fifth Amendment protection beyond its limits, by holding that for purposes of Fifth Amendment civil liability, the constitutional violation is ripe with the filing of charges against a suspect. *See Stoot, supra*; *Higazy v. Templeton*, 505 F.3d 161 (2nd Cir. 2007); *Sornberger v. City of Knoxville*, 434 F.3d 1006 (7th Cir. 2006). Such a broad construction is contrary to Supreme Court authority.

2. TO PROTECT THE FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION, THE LAW HAS PROVIDED ADEQUATE AND EFFECTIVE PROCEDURAL BARRIERS TO CONSTITUTIONAL VIOLATIONS THROUGH SUPPRESSION HEARINGS

As Justice Souter's concurring opinion in *Chavez* correctly pointed out, the "core of the guarantees against self-incrimination is the *exclusion* of any such

evidence." 538 U.S. at 777. The well-designed remedy for obtaining a coerced statement is the suppression of the statement at trial. The Fifth Amendment performs a gate-keeping function by barring from introduction at trial a coerced confession. *Jackson v. Denno*, 378 U.S. 368 (1964). Thus in a suppression hearing aimed at preserving a suspect's Fifth Amendment rights, a judge assisted by legal training, constitutional precedents, trial experience and the labor of able law clerks, and having the benefit of reflection on the totality of circumstances surrounding an interrogation, determines whether a custodial interrogation resulted in a voluntary statement or one obtained by coercion. *Withrow v. William*, *supra*, 507 U.S. at 693-694.

To hold that a suspect's Fifth Amendment rights are violated if his coerced statements are used against him at any point in the legal proceedings – from the filing of charges through the suppression hearing – yields unreasonable results. For example, in the case before the Court, the Ninth Circuit has held that the Fifth Amendment rights of a suspect are violated when his statement is used at a suppression hearing. Yet the very purpose of a suppression hearing is to protect the Fifth Amendment rights of a party by excluding coerced statements from trial. Therefore, it cannot reasonably be said that the judicial review of a coerced statement in a suppression hearing violates the very rights the suppression hearing was designed to protect. Now if the judicial review fails to function properly and a

coerced statement is allowed to be used against a person at trial, then the Fifth Amendment has been violated. But when, as in the case before the Court, the procedural safeguard against Fifth Amendment violations functions exactly as intended and a coerced statement is excluded from trial, then it cannot be said that the suspect's Fifth Amendment rights were violated by the occurrence of the suppression hearing.

Similarly, holding that a Fifth Amendment violation is complete once a statement is used to file charges against a suspect is contrary to this Court's guidance in *Chavez*. This Court in *Chavez* held that the criminal investigatory process does not constitute a criminal case for purposes of the Fifth Amendment. "Although Martinez contends the meaning of a 'criminal case' should encompass the entire criminal investigatory process . . . we disagree." *Id.* at 2001. The investigatory process does not end with the charging of the suspect. Once a suspect is charged, the investigation continues, the right to discovery attaches, and depending on the totality of evidence gathered, the prosecuting authority may either dismiss the charges or proceed to trial. The Ninth Circuit's opinion is in line with *Chavez* only if one assumes that the investigatory process consists merely of the custodial interrogation, and that the moment charges are filed against the suspect the investigatory process terminates. This is not an accurate or complete construction of criminal proceedings.

The Fifth Amendment's function is to protect the right against self-incrimination at a trial. A broader

construction that finds a Fifth Amendment violation to be complete as soon as charges are filed, and every time the statement is used in any pre-trial proceeding, is contrary to Supreme Court authority, ignores the nature of a criminal proceeding, and renders redundant the procedural protections of a suppression hearing. As Justice Souter pointed out in his concurring opinion in *Chavez*, there is no reason to believe that the Fifth Amendment's core guarantee to exclude testimonial admissions has been so ineffective as to justify imposing civil liability for violations of the Fifth Amendment. *Chavez*, *supra*, 538 U.S. at 779.

3. THE SPLIT IN THE CIRCUITS AND THE NINTH CIRCUIT'S POSITION HAS A CHILLING EFFECT ON PROPER LAW ENFORCEMENT ACTIVITY

A coerced confession in violation of the Fifth Amendment does not arise only by virtue of abusive or outrageous police conduct. Rather, the Fifth Amendment precludes the use of statements obtained by forceful conduct as well as through the failure to *Mirandize* a suspect, and even those obtained "by any direct or implied promises, however slight," any subtle psychological pressure, or even "so mild a whip as the refusal . . . to allow a suspect to call his wife until he confessed." *Malloy v. Hogan*, 378 U.S. 1, 7 (1964). Whether an officer's statement to a suspect is an impermissible promise or a perfectly permissible recitation of results that may naturally flow from a

confession; whether a misrepresentation about the state of evidence is allowed or intrudes into the type of promise that may elicit a false confession; whether a willingness to speak to the prosecutor constitutes a permissible reward or prohibited threat; have been the subject of a vast and sometimes contradictory body of state and federal cases. A judge presiding at a suppression hearing makes a legal determination whether or not a certain statement has to be suppressed. This determination is made with the benefit of reflection, briefing, legal research and training, and importantly with the knowledge of the "totality of circumstances" that may or may not have been known to the interrogating officer. By design, our system of justice does not leave the question of coercion solely up to the police officer doing the interrogation. The police officer has neither the legal training nor the time to reflect that exist at the disposal of a judge at a suppression hearing.

As the Petitioners ably point out in their brief, there is currently a split in the circuits as to when a "criminal case" begins for purposes of Fifth Amendment liability. The answer to this question determines whether a police officer can be personally liable for a Fifth Amendment violation when the statement he obtains is used against the suspect for any purpose and at any point during the criminal proceedings. Under the Fifth Amendment rubric adopted by the Ninth, Second and Seventh Circuits, the individual officer may be personally liable for compensatory and punitive damages, and attorneys' fees, if his verbiage

or conduct during an interrogation is later deemed to be coercive, regardless of whether the coerced statement ever sees the light of day at a trial. The same choice of words or conduct later deemed to be coercive portends no personal liability for the police officer in the Third, Fourth or Eighth Circuits because those Circuits properly find that the Fifth Amendment violation is only complete at trial. The divergent approaches in the Circuits create a lack of uniformity on a vital question of constitutional rights. But more importantly, the Ninth Circuit's approach imposes a harmful effect on law enforcement activity.

A custodial interrogation is often times the earliest step in a criminal investigation. The officers detaining the suspect and asking the questions are just beginning to piece together information about a crime that resists disclosure and clarity. Of all the actors involved in a criminal case – the police, the prosecutor, the judge – a police officer has the least amount of legal training, and is neither qualified to make a call as to the voluntariness of a confession nor is he charged with that duty. Yet, under the position adopted by the Ninth, Second and Seventh Circuits, that officer is exposed to civil liability, punitive damages and attorneys' fees even when those in possession of the requisite legal training and charged with the responsibility properly exclude a coerced statement from trial.

Amicus curiae is not arguing that coercive conduct cannot be compensated so long as the resulting statement is not used against the suspect at trial. To

the contrary, outrageous police conduct that "shocks the conscience" is actionable in a due process claim premised on the Fourteenth Amendment (*Rochin v. California*, 342 U.S. 165 (1952); *Fontana v. Haskin*, 262 F.3d 871 (9th Cir. 2001)), regardless of whether the statement is ultimately used against the suspect or whether criminal charges are ever filed. It is sound public policy to deter outrageous police conduct that shocks the conscience through exposure to civil liability, since shocking conduct is much more easily discerned and much more easily prevented through training and sound policy, while presumptively coercive conduct under the Fifth Amendment rubric evades a bright line rule.

Imposing civil liability on a police officer for uttering a set of words that lead to a confession that is ultimately excluded from trial does not deter bad conduct so much as it inhibits the proper and appropriately zealous discharge of official duty. Individual officers will not pursue appropriate lines of questioning with suspects, and will not use their best efforts in investigating crimes, for fear that their seemingly appropriate conduct may later be deemed coercive by a judge, thus resulting in the imposition of civil liability on the officer regardless of whether any statement ever is used at trial.

The specter of personal liability for unintentional and *potentially* illegal conduct will suppress legitimate and appropriately zealous law enforcement activity in the investigation of crimes.

CONCLUSION

The judgment of the Court of Appeal should be reversed because it is counter to the text of the Fifth Amendment, Supreme Court precedent, and because it imposes a harmful chilling effect on the investigative work of law enforcement officers.

Respectfully submitted,

JEFFREY R. EPP, City Attorney
MICHAEL R. MCGUINNESS,*
Asst. City Attorney
OFFICE OF THE CITY ATTORNEY
201 N. Broadway
Escondido, California 92025
(760) 839-4608 Tel.

RICHARD J. SCHNEIDER
GOLNAR J. FOZI
DALEY & HEFT LLP
462 Stevens Avenue, Suite 201
Solana Beach, California 92075
(858) 755-5666 Tel.
Counsel for Amicus Curiae

**Counsel of Record*